UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIAN SCHOOLCRAFT,

Plaintiff,

10 Civ. 6005 (RWS)

- against -

OPINION

CITY OF NEW YORK, et al.,

Defendants.

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A P P E A R A N C E S:

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Defendants Jamaica Hospital Medical Center ("JHMC"), Isak Isakov, M.D. ("Dr. Isakov") and Lillian Aldana-Bernier, M.D. ("Dr. Aldana-Bernier" and collectively, the "Medical Defendants") have moved for an order prohibiting the Plaintiff and his counsel from speaking to the media or communicating via the internet and social media regarding the instant case (the "Gag Order"). In the alternative, the Medical Defendants have moved for a protective order pursuant to Fed. R. Civ. P. 26(c) ("Rule 26(c)") prohibiting Plaintiff and his counsel from publicizing information and documents learned or obtained in the course of discovery requests to outside parties (the "Protective Order").

Upon the conclusions set forth below, the Medical Defendants' motion is denied with respect to the request for a gag order, and granted with respect to the for a protective order pursuant to Rule 26(c).

Prior Proceedings

A detailed recitation of the facts of the case is

provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part JHMC's motion to dismiss. See Schoolcraft v. City of N.Y., No. 10 Civ. 6005 (RWS), 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

On March 28, 2013, the Medical Defendants submitted a letter requesting imposition of the Gag Order, which would prohibit both Plaintiff and his counsel "from speaking to the media regarding this [case] until it is resolved," and "utilizing the internet and social media to stigmatize the defendants in an effort to prejudice a potential jury." Letter of Gregory J. Radomisli dated March 28, 2013 ("Def. Mem.") at 3.[1] The Court opted to treat the letter as a motion for a gag order.

In addition, in the Medical Defendants' reply brief on the instant motion, they suggested as an alternative to the

[1] Although the language suggested by the Medical Defendants applies the internet and social media prohibition only on the Plaintiff, see Def. Mem. at 3, the overall content of the submission makes clear that the Medical Defendants are requesting that all of the suggested restrictions - including those regarding internet and social media - apply to both Plaintiff and his counsel. See, e.g., Def. Mem. at 2 ("In addition, it appears that the plaintiff and/or his attorneys have created or used a Twitter account and an on-line Blog to increase the case's online presence and amass 'support.'").

Gag Order that the Court implement a protective order pursuant to Rule 26(c) prohibiting Plaintiff and his counsel from publicizing information and documents learned or obtained in the course of discovery requests to outside parties (the "Protective Order"). Reply Memorandum of Law in Support of Motion to Limit Plaintiff's and His Attorneys' Contact With the Media ("Def. Reply.") at 3-4. The Court opted to treat this suggestion as supplementing the Medical Defendants' initial motion with a proposed alternative remedy.

The motion for a gag order or, in the alternative, for a protective order pursuant to Rule 26(c), was argued and marked fully submitted on April 10, 2013.

The Request For A Gag Order Is Denied

The Gag Order sought by the Medical Defendants would "prohibit[] the utterance or publication of particular information or commentary[,] [and therefore] imposes a 'prior restraint' on speech," U.S. v. Salameh, 992 F.2d 445, 446 (2d Cir. 1993), which is "the most serious and least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Accordingly, even though

the Medical Defendants contend that the restraint on speech contemplated by the Gag Order is justified because it is "intended to protect a defendant's Sixth Amendment right to trial before an impartial jury[,] [such restraint] normally carries a heavy presumption against its constitutional validity." Salameh, 992 F.2d at 446-47.

With respect to the element of the proposed Gag Order that would restrict the speech of Plaintiff's counsel, see Def. Mem. at 3, the Second Circuit has held that "though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press, the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." Salameh, 992 F.2d at 447 (citing Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2737 & 2744-45) (internal citation omitted).[2]

[2] In support of their motion, the Medical Defendants have cited to Rule 3.6 of the New York Rules of Professional Conduct, which, *inter alia*, prohibits an attorney from making extrajudicial statements that are likely to prejudice a matter in which the attorney is participating. Id. at 3.6(a). However, the mere existence of this rule does not buttress the Medical Defendants' request that Plaintiff's counsel be prohibited from making any statements regarding the instant

The Gag Order as proposed by the Medical Defendants would restrict Plaintiff's counsel from making communications "regarding this matter," *i.e.*, the instant action. Before a court issues this type of "blanket prior restraint" on an attorney's speech, it must "make a finding that alternatives to this blanket prohibition would be inadequate to protect defendants' rights to a fair trial before an impartial jury." Id.

The Medical Defendants have not provided any evidence upon which the Court could base such a finding. Moreover, the Medical Defendants appear to have implicitly acknowledged the overbroadness of their proposed gag order, noting in their reply brief that "[i]n retrospect, the medical defendants recognize that the relief requested in the 3/28/13 Radomisli letter could have been worded more carefully." Def. Reply at 3.

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case; to the contrary, Rule 3.6 specifically provides for certain circumstances under which an attorney is permitted to speak about a pending case with the press. See id. at 3.6(c) & (d). Moreover, "the appropriate remedy for any violation of Rule 3.6 is a disciplinary complaint, not a protective [or gag] order in this case." Munoz v. City of New York, No. 11 Civ. 7402 (JMF), 2013 WL 1953180, at *1 (S.D.N.Y. May 10, 2013).

Given the lack of evidence supporting the necessity of the "blanket prior restraint" that would be entailed by the proposed Gag Order, the Medical Defendants have failed to overcome the "heavy presumption against [the] constitutional validity," of the type of restraint sought. Salameh, 992 F.2d at 446-47.

The Medical Defendants' citation to Rule 3.6 of the New York Rules of Professional Conduct ("Rule 3.6") is also unavailing. Rule 3.6 prohibits, *inter alia*, an attorney from making extrajudicial statements that are likely to prejudice a matter in which the attorney is participating. Id. at 3.6(a). However, Rule 3.6 specifically provides for certain circumstances under which an attorney is permitted to speak about a pending case with the press, see id. at 3.6(c) & (d), and therefore does not support the Medical Defendants' request for a blanket gag order prohibiting any and all speech "regarding" the instant case. Moreover, Rule 3.6 is inapposite because "the appropriate remedy for any violation of Rule 3.6 is a disciplinary complaint, not a protective [or gag] order in this case." Munoz v. City of New York, No. 11

Civ. 7402 (JMF), 2013 WL 1953180, at *1 (S.D.N.Y. May 10, 2013).

The Request For A Protective Order Is Granted

Subsection (c) of Rule 26 of the Federal Rules of Civil Procedure provides, in pertinent part:

> A party or any person from whom discovery is sought may move for a protective order, [and] [t]he court may, for good cause, issue an order to protect a party or person . . . [by] specifying terms . . . for the disclosure or discovery.

Fed. R. Civ. P. 26(c)(1)(B).

In the instant motion, the Medical Defendants have requested the issuance of a protective order pursuant to Rule 26(c) that "prohibit[s] the plaintiff and his counsel from . . . disseminating information and documents (e.g., defendant deposition transcripts) learned or obtained in the course of discovery to outside parties." Def. Reply at 3-4.

As opposed to the Gag Order requested by the Medical Defendants, an order pursuant to Rule 26(c) "prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984). Rather, such an order may be issued provided (i) the order is limited to the context of pretrial civil discovery, (ii) the order does not restrict the dissemination of information if gained from other sources, and (iii) there is a showing of good cause as required by Rule 26(c). Id. at 37. "[I]t is the burden of the party seeking the order to show that good cause exists for issuance of the order." Mazzocchi v. Windsor Owners Corp., No. 11 Civ. 7913 (LBS), 2012 WL 3288240, at *9 (S.D.N.Y. Aug. 6, 2012) (quoting Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004)) (quotation marks and alterations omitted).

The plain language of the proposed Protective Order satisfies the first two requirements. The salient question, therefore, is whether the Medical Defendants have satisfied their burden of establishing that there is "good cause" to issue such an order.

There is a split within the district courts of this Circuit as to the showing necessary to establish that good cause exists. Some courts have held that "[t]he party opposing disclosure must make a *particular and specific demonstration of fact* showing that disclosure would result in an injury sufficiently serious to warrant protection[, and thus] broad allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test." In re Parmalat Sec. Litig., 258 F.R.D. 236, 244 (S.D.N.Y. 2009) (emphasis added); see also id. at n. 4 (describing split within this Circuit). Other courts, however, have "dispensed with the specificity requirement, only demanding that the moving party show good cause." Topo v. Dhir, 210 F.R.D. 76, 77 (S.D.N.Y. 2002).[3]

Although the Second Circuit has not directly addressed this matter, it has issued several opinions that cite to Rule 26(c)'s good cause requirement without noting an attendant specificity requirement. See Dove v. Atl. Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992); Penthouse Int'l, Ltd.

[3] The same split exists on an inter-circuit level as well. See In re Parmalat, 258 F.R.D. at 244 n. 4 (recognizing circuit split as to "the specificity of proof necessary for good cause under Rule 26(c)").

v. Playboy Enters., Inc., 663 F.2d 371, 391 (2d Cir. 1981). Moreover, "[t]he majority of the courts within this district have only used the specificity requirement . . . when dealing with protective orders seeking to prevent injury to business. Topo, 210 F.R.D. at 78 (collecting cases). Here, the Medical Defendants have requested a protective order to avoiding prejudicing the potential jury pool and thereby jeopardizing the Medical Defendants' right to a fair trial. See Def. Reply at 4. Accordingly, in the instant case the weight of authority militates against requiring "a particular and specific demonstration of fact," In re Parmalat, 258 F.R.D. at 244, in order to establish the requisite good cause.

In support of their contention that the Protective Order is merited in order to prevent jury bias, the Medical Defendants have cited to a news article quoting Plaintiff's father, wherein the father "is specifically quoted as having said that he and his son replaced his attorneys because they 'want[ed] a more media-driven, public airing,' in contrast to his former attorneys who were litigating this case 'in the traditional manner - through the courts.'" Def. Reply at 1 (quoting Def. Mem., Ex. A). In addition, as evidence that "the plaintiff and his attorneys are affirmatively seeking out

the press in an effort to prosecute their case," the Medical Defendants have referenced "an abundance of press releases" from Plaintiff's counsel, as well as "a Twitter account and an on-line Blog [intended] to increase the case's on-line presence and amass 'support'" for the Plaintiff. Def. Mem. at 2. Finally, the Medical Defendants have referenced a news article quoting one of Plaintiff's attorneys as having commented as follows regarding defendant Dr. Isakov's treatment of Plaintiff while Plaintiff was detained in Jamaica Hospital's psychiatric ward:

> This was supposed to be an independent medical examination . . . This doctor [i.e., Dr. Isakov] is not supposed to make his decisions based on what the Police Department says.

Def. Mem., Ex. B. As the Medical Defendants note, this comment goes directly to an issue that is "at the heart of plaintiff's case against the medical defendants." Def. Reply at 5.

Based upon the above, the Medical Defendants have shown good cause for limiting the public disclosure of *certain* materials produced during the course of pre-trial discovery

that, if released to the public, may tend to jeopardize the Medical Defendants' constitutional right to a fair trial. However, the Medical Defendants have failed to show why good cause exists with respect to *all* "information and documents . . learned or obtained in the course of discovery . . . ." Def. Reply at 4-5.

Accordingly, the Medical Defendants are directed to submit to the Court a (i) proposed protective order specifically identifying the "information and documents" whose disclosure they propose to be restricted, and (ii) an accompanying letter explaining why the public disclosure of each of the identified pieces of information and/or documents would raise a concern regarding the Medical Defendants' ability to receive a fair trial by jury.[4]

[4] To avoid the possibility of negating its very purpose, the letter shall be filed under seal.

Conclusion

Based upon the conclusions set forth above, the Medical Defendants' motion is denied with respect to their request for a gag order, and granted with respect to their request for a protective order, pursuant to the provisions set forth above.

It is so ordered.

New York, NY
August 26, 2013

ROBERT W. SWEET
U.S.D.J.